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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JULIE K. ALBAN,

Plaintiff and Appellant,

v.

ALBAN VINEYARDS et al.,

Defendants and Respondents.

B211935

(Los Angeles County
Super. Ct. No. BC375796)

APPEAL from judgments of the Superior Court of Los Angeles County, Ann N. Jones, Judge. Affirmed.

Hillel Chodos and Jonathan P. Chodos for Plaintiff and Appellant.

Poole & Shaffery, David S. Poole and Brian R. Tinkham for Defendants and Respondents Alban Vineyards, Inc., John Alban and Sarah Lorraine Alban.

Cole Pedroza, Kenneth R. Pedroza and Matthew S. Levinson for Defendants and Respondents Seymour L. Alban and Reva M. Alban.

I. INTRODUCTION

Plaintiff, Julie Alban, appeals from summary judgments in favor of defendants, Seymour, Reva, John and Sarah Alban and Alban Vineyards, Inc. (the winery).¹ This lawsuit concerns ownership of a piece of real property, which indisputably was purchased as a family compound and for the operation of the winery. The property was purchased in October 1989 by Seymour and Reva, plaintiff's parents, for \$2 million. Seymour and Reva subsequently transferred ownership of the property (subject to certain life estates by plaintiff and others in two residences) to John and Sarah, plaintiff's brother and sister-in-law. The winery was originally owned by Seymour and Reva but operated by John and Sarah. Seymour and Reva also transferred ownership of the winery stock to John and Sarah. John and Sarah continue to operate the winery. The winery is world renowned and at the time of the summary judgment motions was valued at approximately \$25 million.

At issue is whether the transfers of interests in the real property and the winery by Seymour and Reva to John and Sarah violated oral promises made to plaintiff. According to plaintiff, the transfers violated Seymour's promises to her to leave her 60 percent of the parents' existing and future assets upon their deaths and to create a "safe haven" retreat for her in a family compound. The promises were allegedly made in exchange for plaintiff's compromise of claims resulting from her father's conduct on June 7 and 8, 1988. On June 8, 1988, plaintiff was shot by Brad Ackerman. The gun Mr. Ackerman used to shoot plaintiff was owned by Seymour. We conclude that the trial court did not err in entering summary judgments against plaintiff. Accordingly, we affirm the judgments.

¹ The individual family members in this case all share a common surname. We refer to the individual family members by their first names for clarity and not out of any disrespect.

II. THE FIRST AMENDED COMPLAINT

The first amended complaint alleged that plaintiff was shot by Mr. Ackerman in June 1988, when she was 22 years old. She was paralyzed from the waist down. The gun used by Mr. Ackerman was made available by Seymour to him under negligent circumstances. Plaintiff had claims against Seymour and Mr. Ackerman of at least \$10 million. Plaintiff alleged that Mr. Ackerman's family was very wealthy and offered to pay her at least \$5 million "in exchange for her stipulation that criminal charges" pending against him would be limited to involuntary manslaughter. Plaintiff rejected the offer at Seymour's suggestion and insisted Mr. Ackerman should be prosecuted for attempted murder. According to plaintiff, Seymour knew that course of conduct "would effectively reduce the collectible value" of her claim against Mr. Ackerman from in excess of \$5 million, to approximately \$1 million.

Plaintiff alleged: "However, and in order to persuade plaintiff that she would not suffer any financial loss by following his suggested course of action, Seymour promised plaintiff that if she would acquiesce in his suggestions and thereby be forced to accept \$1 million from [Mr. Ackerman] in full settlement of her injury claim: (a) he would always provide for plaintiff by devoting half of his future earnings to her support and maintenance; (b) in addition, that he would see to it that at least 60 [percent] of his and Reva's existing and future assets were preserved and held for plaintiff, and left to plaintiff after they died; and (c) in addition, [Seymour and Reva] would seek out and acquire a secluded tract of land in California which would be held by them in trust for plaintiff throughout her lifetime, to be used primarily by her, but also by other members of her immediate family, as a secure and comfortable safe haven and retreat, where she could escape the stresses of ordinary life and find comfort in the bosom of her family, and which would be left to her after the death of Seymour and Reva as part of her share of their estate. All of said promises were made by Seymour with the full knowledge and consent of Reva, and the promises with respect to the safe haven tract of land were made with the full knowledge and consent of plaintiff's siblings, including John." According

to the first amended complaint, John knew that the safe haven tract of land was to be purchased and held primarily for plaintiff's benefit.

Plaintiff further alleged that John had obtained a degree in enology and desired to pursue a career in the wine making field. John proposed their parents purchase more than 200 acres in Arroyo Grande. This would allow the safe haven retreat promise to be fulfilled. Also, the purchase of the property would provide John with an opportunity to lease a portion of the land to create and operate a vineyard to exploit his knowledge and talents as a wine maker. John allegedly proposed that the winery would be owned for the entire family's benefit including plaintiff. Seymour acquiesced in the plan. Plaintiff supported the plan based on her trust in her brother, John, not to interfere with promises that had been made to her.

Seymour and Reva purchased the Arroyo Grande property for \$2 million. Seymour and Reva provided financing for the construction of two homes on the property. One of the homes was a retreat for Seymour, Reva, John, and Sarah. The other home was for plaintiff.

The property was made available to John, Sarah and the winery. Plaintiff alleged that Seymour and Reva originally owned 100 percent of the winery. But later, Seymour and Reva became owners of only 60 percent of the outstanding shares of the winery. Thirty-six percent of the shares were to be held in trust for plaintiff. Since it was first acquired, the property has increased in value to in excess of \$25 million. Plaintiff alleged that she has always believed and assumed that the Arroyo Grande property and at least 36 percent of the shares of the winery was being held in trust for her. This was her share of her parents' estate and would belong to her subject to a vineyard lease after their deaths. Plaintiff learned that her parents had breached their promises to her and transferred all of the Arroyo Grande property and all their shares in the winery. The stock had been transferred to John and Sarah, plaintiff's brother and sister-in-law as gifts or without consideration. Plaintiff alleged the transfers were made with full knowledge they were inconsistent with promises that had been made to her. Seymour and Reva have disavowed any such promises were made or any legal obligations to plaintiff. In a similar

vein, John and Sarah denied knowledge of any obligation to plaintiff. The first amended complaint contained five causes of action: fiduciary breach and imposition of a constructive trust against all defendants (first); contract breach against Seymour and Reva (second); interference with contract against John and Sarah (third); fiduciary duty interference against John and Sarah (fourth); and personal injury against Seymour (fifth). Defendants answered the first amended complaint and filed summary judgment motions.

III. SEYMOUR AND REVA'S SUMMARY JUDGMENT MOTION

A. Seymour and Reva's Factual Assertions

The parties agreed that the following facts pertinent to Seymour and Reva's summary judgment motion: plaintiff is Seymour and Reva's daughter; Seymour was a member of the Los Angeles County Sheriff's Reserve; on June 7, 1988, Seymour attended a Reserve meeting; Seymour took Mr. Ackerman to the meeting as a guest; Mr. Ackerman was a neighbor and plaintiff's ex-boyfriend; Seymour also took his service revolver with him to the meeting; Seymour intended to use the revolver for target practice prior to the meeting; Seymour returned home and left the revolver in the trunk of his car; Seymour's car was parked in a locked and alarmed garage; also on June 7, 1988, plaintiff invited Mr. Ackerman to spend the night in the home that she shared with her parents; Mr. Ackerman stayed in the room down the hall from plaintiff's bedroom; sometime, early in the morning on June 8, 1988, Mr. Ackerman disarmed the garage alarm and removed Seymour's gun from the trunk; Mr. Ackerman shot plaintiff first and then himself; plaintiff is now a paraplegic due to a spinal cord injury from the shooting; Mr. Ackerman was initially convicted of attempted murder in December 1988 but his conviction was reversed on appeal; Mr. Ackerman subsequently pled guilty to a manslaughter charge; and plaintiff settled a lawsuit against Mr. Ackerman for \$1 million.

It was undisputed that, since the shooting, Seymour had given plaintiff everything she needed and wanted except for title to the Arroyo Grande property. Plaintiff admitted

that she was not entitled to title to any portion of that property until her parents' deaths. Plaintiff also admitted that her parents had: given her at least \$1 million for living expenses but disputed that they had given her \$1.5 million; given her a home which once belonged to Seymour's mother; allowed her to live rent free in her parents' home and they paid for two remodels of the residence for her ease of access; made her the beneficiary or co-beneficiary of well over \$5 million under two life insurance policies; made plaintiff the beneficiary of two irrevocable trusts giving her title to her parents' home; given her a \$100,000 promissory note from her brother, Joe; and given her a 20 percent interest in a San Luis Obispo commercial property. Plaintiff questioned the value of a Long Beach home contending it was actually worth only about \$1 million. Plaintiff, however, did not dispute that Seymour had offered to pay her 50 percent of his salary from his own orthopedic surgery practice if she came to work for him. Plaintiff instead attended law school and worked as a prosecutor and then in private practice.

In October 1989, Seymour and Reva purchased the Arroyo Grande property, which was undeveloped. The property was originally purchased to be used as a family compound, safe haven, and retreat. The land was also to be used by John to establish a vineyard and winery. Plaintiff disputed whether John had paid \$400,000 to acquire a 20 percent ownership interest in the property from his parents in the early 1990's. Plaintiff also claimed that she was unaware of the transfer, which she believed was essentially a gift to John. Between 1989 and 2005, John acquired a 40 percent interest in the winery. The transfers of stock were in recognition of his work and money he contributed. Seymour and Reva also made gifts to stock to John.

In 2002, a dispute erupted over the property and the vineyards. In 2006, Seymour and Reva transferred their remaining ownership interest to John. Seymour and Reva retained life estates in the residences for: themselves; the lives of plaintiff and a sister Jill; and the lives of plaintiff's and Jill's children. The life estates also include approximately seven acres which were used by the family.

Plaintiff's parents also admitted for purposes of the summary judgment motion that she had made the following allegations in the first amended complaint: she had a

valid and collectible claim of \$10 million against Seymour for his negligence regarding the revolver; she could have collected \$5 million from Mr. Ackerman and his family if she had stipulated to reduce the charge to involuntary manslaughter; she followed Seymour's advice to insist on an attempted murder charge; and she chose not to prosecute her claims against Seymour based on his oral promises to provide financially for her during her lifetime and to leave her 60 percent of the overall estate and more than her siblings. Plaintiff admitted that her parents were both still living and that any promises to her about the Arroyo Grande property were oral.

Plaintiff admitted consulting an attorney shortly after the shooting. Plaintiff was told she had a potential claim against Seymour. However, she disputed whether she actually told Seymour that she believed that he was responsible in some way for the shooting. Plaintiff disputed whether her parents had ever entered into a tolling or waiver agreement with her regarding the statute of limitations on claims against Seymour regarding the shooting.

Plaintiff's parents relied on her discovery responses including testimonial admissions at her deposition. Plaintiff admitted at her deposition Seymour never agreed that he would not make gifts to anyone but her. At one point, plaintiff testified that she believed that her parents were holding assets that were designated for her. The Arroyo Grande property was one asset. Plaintiff did not believe that it was the entire Arroyo Grande parcel. According to plaintiff, it meant 60 percent of all of his assets.

The following questions were asked and answered at plaintiff's deposition to clarify what the term "60 percent" meant: Plaintiff was asked: "Of each individual asset or 60 percent of the whole of the estate? What was your understanding?" Plaintiff replied, "Well, my understanding is that my father said '60 percent of everything I have will go to you.'" The following colloquy then ensued at plaintiff's deposition: "Q Did you understand that to mean individual assets – that you get 60 percent of the house, that you get 60 percent of each bank account, that you get 60 percent of each insurance policy, 60 percent of every parcel of land or other investment? [¶] A Well, there [were] some things that I knew I was getting more than 60 percent of. [¶] Okay. [¶]

You know, like the life insurance. That was what my mom said. [¶] Q Did you ever stop to consider whether that was a promise for 60 percent of each individual asset or 60 percent in value of the entire estate? [¶] A I don't know if I made that distinction. [¶] Q Did you ever have a discussion with your father concerning whether it was 60 percent in value of the entire estate as opposed to 60 percent of each individual asset that made up the estate? [¶] A I don't know. [¶] Q You don't recall such a discussion? [¶] A 60 percent of the value versus 60 percent of a particular asset? [¶] Q Well, there are different ways you can calculate 60 percent. [¶] You can say there are 100 assets in an estate, and you get 60 percent of each of the 100 assets. [¶] Or you can say the estate is worth \$10 million, and you get 60 percent or \$6 million worth of the assets. [¶] Either way, you get 60 percent of the estate. [¶] My question to you is did you ever have a discussion with your father about whether it was one of the other of those – whether it was 60 percent of the total value or 60 percent of each individual asset that made up the estate? [¶] I don't – I don't recall that. [¶] Okay. [¶] I'm not entirely clear on what it is that you believe you're entitled to with respect to the Arroyo Grande ranch. [¶] Can you explain to me what you understand you're entitled to with respect to that ranch? ... [¶] A I would believe I'm entitled to whatever would be consistent with my father's promise. [¶] Q Okay. [¶] And what do you understand to be your father's promise with respect to the ranch, specifically? What portion of the ranch did he promise you? [¶] A You mean just the real estate? [¶] Q I'm just asking about the ranch. I'm trying to understand what it is you believe you're entitled to with respect to the ranch so that I have an understanding of that [¶] A -- [M]y understanding is that I was entitled to 60 percent of it and that my siblings were also entitled to a share of it. That was my understanding, initially, what it was at the outset [¶] Q And what was that understanding based on? [¶] A What my father said to everyone, you know. That he wanted to buy a family compound soon after I was shot. That became the topic of discussion. [¶] Because, you know, we were so angry at the Ridders having Brad live across the street from me, and I felt so unsafe. And my greatest feeling of security and

joy was being surrounded by my family. And it was kind of this wonderful dream of having this private retreat that would also have tremendous potential as an investment.”

The property was surrounded by other high end ranches that had been subdivided. However, although it was possible to subdivide the family ranch, Seymour said that during his lifetime he did not want to subdivide the property. Seymour wanted the property to be a family compound.

B. Plaintiff's Opposition to Her Parents' Motion

According to plaintiff, the “family compound” or safe haven concept came up in family discussions after she was shot and Mr. Ackerman was released from custody. Mr. Ackerman's family refused to move from the neighborhood. So Seymour decided to buy a tract of land outside of Los Angeles as a safe haven for plaintiff. In paragraph 14, of her declaration, plaintiff declared: “My father and I discussed the idea that if I had recovered the full amount of damages to which I was entitled, I could have purchased the safe haven property myself and owned it outright. However, because of our agreement, all of the money that was ultimately to go to me was being retained by my parents during their lifetime. My father therefore explained that he would buy the safe haven property and continue to own it during his and my mother lifetime, but that in essence it would be held in trust for me and left entirely to me after their deaths. We also discussed the idea that during their lifetimes, the property to be purchased would not only be a safe haven for me, but would also be used as a family compound for my parents and my siblings, so that when I was at the property I could be surrounded by my family and have the comfort their companionship would provide.” According to plaintiff, Seymour looked at other properties other than the Arroyo Grande property. However, John wanted to start a vineyard located on the Arroyo Grande property. John said that it would also accommodate the creation of a safe haven for plaintiff and a “family compound for [Seymour, Reva] and [plaintiff's] other siblings.” Plaintiff declared, “[John] assured me

repeatedly that he understood the [land] was to be owned by my parents but held in trust for me until their deaths”

In paragraph 19 of her declaration, plaintiff declared: “It is true that in or around 1991, I was told that [John] had settled a lawsuit and received a settlement of about \$400,000. My parents told me that [John] was going to pay them the \$400,000 (which was about 20 [percent] of what they had paid for the Arroyo Grande property), in exchange for ownership of 20 [percent] interest. They asked me if I had any objection to his becoming the owner of 20 [percent], leaving them and (ultimately me) as the 80 [percent] owner. I told them that I had no objection to such a transaction, as I was happy for them to obtain reimbursement for part of their purchase price, and because I knew that [John] was trying to develop a winery on a portion of the Arroyo Grande property, and saw no reason why he should not own the portion he was developing if he was able to pay for it.”

C. Summary Judgment In Favor Of Plaintiff’s Parents

Plaintiff’s parents’ summary judgment motion was granted. In deciding the motion, the trial court relied principally upon *Westbrook v. Superior Court* (1986) 176 Cal.App.3d 703, 711-714. The trial court stated: “With regard to the plaintiff’s testimony that defendants Seymour and Reva promised to leave her [60] percent of the estate upon their deaths and to acquire a family compound primarily for her benefit, the property in which plaintiff claims [an] interest cannot be identified during the lives of Seymour and Reva. [Citation.] An agreement by which the promisor agrees to leave to another whatever property he owns at the time of [his] death is insufficiently specific to support the imposition of a constructive trust in the hands of the promisor. [Citation.] In this case, as in *Westbrook*, the claimed agreement is not specific as to any identifiable property. Seymour and Reva have the rest of their respective lives to comply with the purported agreement. And, in addition, the property to which [plaintiff] might have a claim cannot be identified until their deaths. [Citation.] [¶] The Arroyo Grande property

is not specifically identified or promised to plaintiff, as testified to by plaintiff. The Arroyo Grande property was purchased in October 1989, long after plaintiff allegedly agreed to give up a \$5 million settlement from the Ackermans in exchange for Seymour's promise of a sixty percent share of the estate and a family retreat. There is simply no competent evidence to support plaintiff's allegation that there was a third and separate promise made to her years after her injury that she would inherit the property in Arroyo Grande. Her own version of the promises fails to include that she was to inherit the family compound wholly and entirely. As a matter of law, therefore, there is no basis for an imposition of a trust or a claim for breach of fiduciary duty or breach of contract respecting the Arroyo Grande property. Plaintiff's first and second causes of action as to these defendants, therefore, is entirely premature."

The trial court ruled: the one-year statute of limitations, which was in effect at the time plaintiff was shot, barred her personal injury claim; plaintiff's own declaration showed that she was aware of and discussed with her attorneys Seymour's culpability for the shooting in 1988 or 1989; and plaintiff did not have a viable tolling defense because her own declaration shows that there was a "settlement" regarding the negligence claim. The terms of the settlement were plaintiff would not sue her father and would insist on an attempted murder prosecution for Mr. Ackerman. Also, the settlement required Seymour to take care of plaintiff for life and make provisions for her to inherit a larger portion of her parents' estates than her siblings. Because Seymour had partially complied with the settlement agreement, the trial court ruled plaintiff cannot revive the original controversy. Plaintiff filed a timely appeal from the judgment entered in favor of Seymour and Reva.

IV. THE SUMMARY JUDGMENT MOTION OF JOHN, SARAH AND THE WINERY

A. Facts Presented By John, Sarah And The Winery

John, Sarah and the winery moved for summary judgment. At the outset, it should be noted that plaintiff's claims against John, Sarah and the winery depend largely upon whether there were any enforceable oral promises to plaintiff made by Seymour. As will be noted, her claims have no merit at present.

Plaintiff agreed that, for purposes of the summary judgment motion, the following facts were undisputed. Prior to February 1990, Seymour, with Reva's consent, orally promised, "[T]hat if [plaintiff] would enter into a settlement of her civil lawsuit and forego other claims he would give plaintiff 60 percent of everything [Seymour] owned." Seymour also orally promised, "[H]e would buy a family compound that plaintiff would primarily benefit from but where plaintiff would be surrounded by family."

John offered evidence that the real property and winery stock had all been transferred to John and Sarah "and/or" in trust for their children in a series of transactions. The transactions included gifts and purchases beginning in the early 1990's and ending sometime in 2006. By 1993, Seymour and Reva had transferred a 20 percent ownership interest in the Arroyo Grande property to John. Plaintiff was aware of the 20 percent transfer in the early 1990's. Plaintiff, however, claimed that she thought the exchange was for a \$400,000 payment and did not know the transfer was for a gift or as token consideration.

Plaintiff also did not dispute that, on January 1, 2004, John purchased 60 percent of the corporation's stock from Seymour and Reva for \$225,000 payable over a 10-year period. The January 1, 2004 purchase encompassed the remainder of the stock owned by Seymour and Reva in the corporation. Plaintiff did not dispute that, in 2006, Seymour and Reva transferred the remaining interest in the Arroyo Grande property to John and

Sarah: “in consideration” for cash payments; in recognition for the value of the development and “sweat equity” John had conferred into the Arroyo Grande property; and to accomplish the estate planning objectives of Seymour and Reva.

John declared that he did not know of any alleged promises by Seymour regarding the estate or the family compound. John cited plaintiff’s deposition testimony that she did not believe that either he or any family member had knowledge of the 60 percent promise. Plaintiff testified that the only people who knew about the promises were Seymour and Reva. John, Sarah and the winery cited plaintiff’s deposition testimony that no one was present when Seymour allegedly made the 60 percent oral promises. Plaintiff also testified that her parents’ promised to provide a family compound for her. The compound would allow plaintiff to be surrounded by family. Notably, plaintiff did not testify that Seymour promised that the family compound would be in the form of a “fee interest” for her.

B. Plaintiff’s Opposition

Plaintiff’s declaration filed in opposition to the summary judgment motion of John, Sarah and the winery repeated the factual assertions made in opposition to Seymour and Reva’s similar request. Among other things, both of plaintiff’s declarations stated that Seymour promised he would purchase a safe haven that would be owned by her parents during their lifetimes. However, the safe haven property would be held in trust for plaintiff and left entirely to her after their deaths. Plaintiff further declared: Seymour looked at other properties other than the Arroyo Grande property; John located the property in order to accommodate the creation of a safe haven for plaintiff and a family compound for her parents and other siblings; and “[John] assured me repeatedly that he understood the [land] was to be owned by my parents but held in trust for me until their deaths”

C. Summary Judgment In Favor Of John, Sarah And The Winery

The trial court: granted the summary judgment motion in favor of John, Sarah and the winery; ruled plaintiff failed to produce any competent evidence to support an inference that John or Sarah knew of any obligations arising from Seymour's 60 percent promise; and ruled plaintiff admitted at her deposition that no persons other than only she and her parents were present when the promises were made. The trial court concluded: "No competent evidence relating to the terms of the trust have been provided by plaintiff. All that has been provided is a letter from a lawyer outlining broadly the terms of a family trust. There is nothing in this letter that permits an inference that John . . . would be aware that the Arroyo Grande property was subject to promises that [60] percent of that property would revert to plaintiff upon the death of Seymour and Reva. Assuming the letter is admissible (which it is not-- . . .), it states only that Julie will receive 60 percent of the assets contained in the estate at the time of the death of either Seymour or Reva, assuming that the surviving spouse does not amend the estate plan thereafter. Nothing in this document, even if plaintiff could establish (which she cannot) that John was aware of its terms, would support a reasonable inference by a finder of fact that John knew that the Arroyo Grande property would be held in trust primarily for the benefit of Julie, as plaintiff contends."

The trial court also ruled: the absence of knowledge negated plaintiff's interference (fiduciary and contract) and constructive trust claims; no constructive trust could be imposed against John and Sarah over the Arroyo Grande property and the corporate stock because they are bona fide purchasers; the undisputed evidence showed the transactions were made to minimize taxes and maximize the value of the transfers; the transfers were also made with consideration and in recognition of John's work in increasing the value of the Arroyo Grande property, and there was no evidence of any intentional acts by John or Sarah to support a jury finding of malice, oppression or fraud which would permit the imposition of punitive damages.

The trial court concluded plaintiff's "family compound" promise was too vague as a matter of law to be enforceable. The trial court ruled: "As described by plaintiff at her deposition, this promise was 'one of those things that was talked about, was buying a family compound, that, you know, primarily I would benefit from, but I would be surrounded by family.' [Citation] The promise does not specify where this family compound would be located, it[s] size, whether it would be a condominium, house or ranch. All that is clear from the promise is that it would be outside of Long Beach. There is nothing in this promise that specified when the compound would be acquired or for how long it was going to be maintained for the purpose of a family retreat. Nor, as plaintiff's counsel argued, is there any mention in plaintiff's own characterization of the 'family compound' promise that she would inherit the entire property upon the death of her parents . . . [¶] Clearly, as described by plaintiff herself, the family compound promise did not require Seymour or Reva to give any fee interest in the property to the plaintiff. Moreover, the provision of a life estate for plaintiff and her children in a residence on the Arroyo Grande property, which occurred in December 2006, would appear to be a complete fulfillment of the promise - - as could a number of other alternatives, thereby demonstrating its inherent vagueness." This timely appeal followed entry of judgment in favor of John, Sarah and the winery.

V. DISCUSSION

A. Standard of Review

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, our Supreme Court described a party's summary judgment or adjudication motion burdens as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon.

[Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]” (Fns. omitted, see *Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) We review the trial court’s decision to grant the summary judgment motions de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, disapproved on another point in *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 853, fn. 19.) The trial court’s stated reasons for granting the summary judgment motions are not binding on us because we review its ruling not its rationale. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196; *Dictor v. David & Simon, Inc.* (2003) 106 Cal.App.4th 238, 245.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, superseded by statute on a different point as stated in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768.) Those are the only issues a motion for summary judgment must address. (*Turner v. Anheuser-Busch, Inc., supra*, 7 Cal.4th at p. 1252; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

B. Seymour And Reva's Summary Judgment Motion

1. Overview

At issue in this case are alleged oral promises to make a disposition of property and to provide a safe haven for plaintiff in a family compound. As noted, plaintiff alleged: Seymour made an oral promise that Seymour and Reva would make testamentary dispositions of 60 percent of their estates to her upon their deaths; plaintiff would receive the percentage of the estate of Seymour and Reva; the oral promise was allegedly made sometime after June 1988 when plaintiff had been shot with Seymour's gun; and the promise was allegedly tied to plaintiff's reliance on Seymour's advice that Mr. Ackerman should be charged with attempted murder rather than manslaughter. Seymour allegedly made the oral promise in exchange for two things. First, plaintiff agreed to forego a \$5 million settlement from Mr. Ackerman. Second, plaintiff agreed not to pursue any negligence claims against Seymour for allowing Mr. Ackerman access to the gun. In the current lawsuit, plaintiff sought damages and imposition of a constructive trust on theories of fiduciary and contract breach as the Arroyo Grande property and the winery. She also sought damages against Seymour on a negligence theory.

2. Seymour and Reva are entitled to summary judgment on the fiduciary and contract breach claims.

The general rule concerning enforcement of a contract to make a will is that the promise cannot be enforced during the promisor's lifetime. (*Ludwicki v. Guerin* (1961) 57 Cal.2d 127, 130; *Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 846; *In re Marriage of Edwards* (1995) 38 Cal.App.4th 456, 460; *Thompson v. Boyd* (1963) 217 Cal.App.2d 365, 376; *Goldstein v. Hoffman* (1963) 213 Cal.App.2d 803, 811-812.) This

is because a contract to make a will is not breached unless the agreement has not been complied with at the time of the promisor's death. (*Ludwicki v. Guerin, supra*, 57 Cal.2d at p. 130; *Brewer v. Simpson* (1960) 53 Cal.2d 567, 593; *Goldstein v. Hoffman, supra*, 213 Cal.App.2d at p. 812.) Thus, as general rule, such a promise must await the death of the promisor. And the promise is enforced through the equitable remedy of quasi specific performance by the imposition of a constructive trust on property that was disposed of in violation of the promise. (See *Estate of Housley* (1997) 56 Cal.App.4th 342, 351-352, 357-358; see also *Estate of Watson* (1986) 177 Cal.App.3d 569, 573.) An exception to the general rule occurs where during his or her lifetime, the promisor has made an inter vivos transfer of the property which is *specifically* covered by the agreement. (See *Brown v. Superior Court* (1949) 34 Cal.2d 559, 563-564; *Battuello v. Battuello, supra*, 64 Cal.App.4th at p. 846; *Westbrook v. Superior Court, supra*, 176 Cal.App.3d at p. 711.) But, the exception only occurs where there has been a promise about *specific* property. In addition, the exception occurs only where the promisor has restricted his or her right to dispose of the property during her or his lifetime. (*In re Marriage of Edwards, supra*, 38 Cal.App.4th at pp. 460-461; *Westbrook v. Superior Court, supra*, 176 Cal.App.3d at p. 712.) If the promise only refers to "property owned at the time of death"; no promise can be enforced until the death of the promisor. (*In re Marriage of Edwards, supra*, 38 Cal.App.4th at pp. 460-461; *Westbrook v. Superior Court, supra*, 176 Cal.App.3d at p. 712.)

Given the aforementioned standards, the trial court properly granted summary judgment as to the Arroyo Grande property and winery. The oral contract to make a will in this case was that 60 percent of Seymour and Reva's estates would be left to plaintiff upon the parents' deaths. To be exact, plaintiff testified at her deposition that Seymour promised her "60 percent of the estate" or "60 percent of everything" when her parents died. By virtue of the express language of the promise providing for disposition of whatever property that is owned at their deaths, there can be no breach until either Seymour or Reva die. An agreement to make a will is breached only if it has not been complied with at the time of the promisor's death. (*Ludwicki v. Guerin, supra*, 57 Cal.2d

at p. 130; *Brewer v. Simpson*, *supra*, 53 Cal.2d at p. 593.) Because both of plaintiff's parents are still alive, there has been no breach of the agreement.

Moreover, even if plaintiff is correct that Seymour promised to leave her 60 percent of everything he and Reva owned at the time of their deaths, no constructive trust exists as to the Arroyo Grande property. There is no admissible evidence Seymour promised to leave plaintiff a *specific* piece of property. As previously noted, plaintiff admitted in her deposition that Seymour did not agree to leave any *specific* property to her. Whatever Seymour and Reva owned or their respective estates will consist of upon their deaths is not presently identifiable. In other words, because both Seymour and Reva are still alive, the property "whatever they own upon their deaths" cannot be identified with requisite specificity.

Furthermore, we disagree with plaintiff that a triable issue of fact remains on this issue because her parents purchased the Arroyo Grande property sometime after Seymour allegedly made the 60 percent estate promise. Plaintiff testified at her deposition that Seymour did not identify any specific property that would be left to her at the time the promise was made. Plaintiff testified that she did not know if the promise meant 60 percent of each piece of real and personal property. Also, plaintiff did not know if the promise referred to 60 percent of the total of their assets.

There is no merit to the suggestion the Arroyo Grande property was meant to satisfy the 60 percent promise. The Arroyo Grande property could not have been the subject of the oral agreement. It had not been acquired at the time the promise was initially made. Plaintiff claimed that the promises were made in order to ensure that Mr. Ackerman would be prosecuted for attempted murder. Mr. Ackerman was convicted of attempted murder in December 1988. The Arroyo Grande property was not acquired until October 1989. Thus, Seymour and Reva did not own the Arroyo Grande property at the time of the 60 percent promise.

In any event, the only evidence linking the 60 percent promise to the Arroyo Grande property is plaintiff's own declaration offered in opposition to her parents' summary judgment motion which contradicted her deposition admissions. Plaintiff

declared the Arroyo Grande property was purchased with the intent that it be held in trust for her. Plaintiff's declaration contradicted her deposition testimony that she did not recall having any discussion with her parents about whether she would have 60 percent of the total or of each one owned by her parents. Plaintiff could not create a triable issue of material fact by contradicting her prior sworn statements that she did not recall the precise nature of the 60 percent promise. Because plaintiff testified that no specific property was identified, plaintiff cannot now claim a right to a constructive trust on either the Arroyo Grande property or winery. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 592-593.)

In addition, Seymour's alleged promise concerning a "family compound" or safe haven did not require the summary judgment motion be denied. Plaintiff argues Seymour promised her a fee interest in the "family compound" or safe haven. Assuming such a promise was made to plaintiff, no evidence was introduced that the Arroyo Grande property was the only property which would satisfy the "family compound" agreement. And, plaintiff admitted in her deposition that no specific property was identified for the purpose of fulfilling the 60 percent promise. Plaintiff's only evidence in this respect is her declaration which contradicts her deposition admissions as we have discussed.

Also, the evidence shows that the Arroyo Grande property was purchased and has been used by the parties as a "family compound" since it was acquired. Two residences have been built on the property. One of the residences was built for plaintiff. Thus, while an inference could be made that the Arroyo Grande property satisfies the "family compound" promise, there was no evidence that Seymour has breached any agreement with plaintiff. This is because there is simply no competent evidence that a fee interest was promised to her in the family compound. It is undisputed plaintiff has a life estate in the property. And plaintiff's children have a life estate in the Arroyo Grande property. This evidence shows that the family compound promise has been satisfied. Plaintiff has failed to create a triable issue of material fact based on the "family compound" promise.

Plaintiff relies in part of a letter from an attorney to Seymour concerning a trust arrangement. The trial court sustained objections to the letter. No issue was raised in the

opening brief concerning the admissibility of the letter. Thus, any issue concerning the admissibility of the letter has been waived. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 895, fn. 10.) In any event, without abusing its discretion, the trial court could have sustained the objections to the letter because it was not properly authenticated and was hearsay. (Evid. Code § § 1200; 1401; *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 190, fn. 21; *Beane v. Paulson* (1993) 21 Cal.App.4th 89, 92-93, disapproved on another ground in *Beal Bank SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 514.)

To summarize, plaintiff cannot prematurely impose a constructive trust against the Arroyo Grande property or the winery during her parents' lifetime. No specific property was identified concerning the promise to leave plaintiff 60 percent of the parents' estates upon their deaths. Her parents were free to dispose of their interests in the property as they chose during their lifetimes. In addition, there is no basis for claiming fiduciary and contract breaches because the estates or property owned at the parents' deaths cannot be determined until they are both dead. Any alleged oral promises concerning the family compound have been either satisfied by her parents in building a home and granting life estates to plaintiff and her children. In any event, there is no evidence to support a claim that plaintiff was promised a fee interest in the Arroyo Grande property. For all these reasons, Seymour and Reva were entitled to summary adjudication of the first and second causes of action.

3. Seymour is entitled to summary judgment on the negligence claim.

The parties agree that, at the time of plaintiff's injury, the statute of limitations for a personal injury action was one year under former Code of Civil Procedure section 340, subdivision (3). (Stats. 1982, ch. 517, § 97, p. 2334; *Krupnick v. Duke Energy Morro Bay L.L.C.* (2004) 115 Cal.App.4th 1026, 1028-1029.) Plaintiff was shot in June 1988. Plaintiff did not pursue any personal injury claims against Seymour until August 13,

2007. Plaintiff's personal injury claim expired well before this action was filed. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109; *Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 778-779.)

We also disagree with plaintiff that the one-year statute of limitations is not a bar to this action because of Seymour's 60 percent promise and agreement to support plaintiff for the rest of her life. (Code Civ. Proc., § 340; Stats. 1982, ch. 517, § 97, p. 2334.) According to plaintiff, these promises toll the one-year statute or estop Seymour from asserting a one-year statute of limitations argument. However, these promises do not act to toll the statute of limitations nor do they estop Seymour from asserting plaintiff's negligence claim is time barred. In any event, what plaintiff is actually contending is that she compromised her personal injury claims in reliance on the oral agreements with Seymour. Such a good faith compromise bars plaintiff from reopening the merits of her negligence claim in the absence of fraud or undue influence. (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677; *Larner v. Los Angeles Doctors Hosp. Associates, LP* (2008) 168 Cal.App.4th 1291, 1296-1297; *A.L.L. Roofing & Bldg. Materials Corp. v. Community Bank* (1986) 182 Cal.App.3d 356, 359.) Thus, plaintiff is bound by the terms of her agreement with her father.

The promises in this case were for inheritance and support. No one disputes that, as far as the support obligation is concerned, the agreement has been performed. It is undisputed that plaintiff has been supported by her parents since 1988. Indeed, plaintiff admitted that, with the exception of the Arroyo Grande property, her father has given her everything she wanted or needed since she was shot by Mr. Ackerman. Plaintiff also admitted that her parents had: given her at least \$1 million for living expenses; given her a home that once belonged to Seymour's mother; allowed her to live rent free in their home; paid for two remodels for her ease of access in their home; made her the beneficiary or co-beneficiary of well over \$5 million under two life insurance policies; made her the beneficiary of two irrevocable trusts giving her title to their home; given her a \$100,000 promissory note from her brother, Joe; and given her a 20 percent interest in a San Luis Obispo commercial property. This evidence establishes that plaintiff was

supported by Seymour since the shooting. Indeed, plaintiff does not contend that she was not supported. As to any inheritance claim, as we have explained, any issue in this regard is premature.

C. The Summary Judgment Motion Of John, Sarah And The Winery

Plaintiff sought damages and the imposition of a constructive trust against John, Sarah and the winery regarding the Arroyo Grande property and wine producing operation. Plaintiff also sought damages for alleged interferences with a fiduciary relationship and contract. The trial court correctly ruled these claims have no merit.

First, there is no evidence that either John or Sarah knew about the 60 percent promise or any purported trust. Actions predicated on the tort of interference require proof that the defendant had knowledge of the contract or relationship. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514; *Youst v. Longo* (1987) 43 Cal.3d 64, 71 fn. 6; *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 765-766 overruled on a different point in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 88; *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585-586.) Plaintiff testified at her deposition that only she and her parents were present when the promises were made. Thus, plaintiff presented no evidence that John or Sarah had actual knowledge of Seymour's 60 percent promise or any alleged trust. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521, fn. 16.)

Plaintiff contends John and Sarah had constructive knowledge of the 60 percent promise. There is no competent evidence that plaintiff has a contractual or any other rights to the Arroyo Grande property and winery. All of plaintiff's inference claims are premised on her rights to 60 percent of her parents' estates. As noted in connection with the claims against her parents, plaintiff admitted at her deposition that she did not even know if the promise meant 60 percent of each piece of property or of their entire estates.

The trial court properly disregarded plaintiff's declaration that she had been promised ownership of the Arroyo Grande property or the winery which contradicted her deposition testimony to the contrary. (*D'Amico v. Board of Medical Examiners, supra*, 11 Cal.3d at p. 22; *Union Bank v. Superior Court, supra*, 31 Cal.App.4th at pp. 592-593.) Seymour and Reva did not even own the Arroyo Grande property or the winery when the promises were supposedly made. Thus, there is no merit to plaintiff's contention that the existence of a 60 percent promise regarding her parents' estate upon their deaths translated into constructive notice that she was promised ownership of the Arroyo Grande property or the winery.

Moreover, the trial court correctly ruled there was no admissible evidence a trust was created giving her ownership of the Arroyo Grande property and the winery. The only evidence offered in support of this claim is plaintiff's declaration and an attorney's letter. Plaintiff's deposition admissions contradicted her declaration and the trial court sustained defendants' objection to the letter. In any event, there is no evidence of a formal trust. Nor is there evidence John and Sarah were placed on notice that the Arroyo Grande property and the winery were being held in trust for plaintiff's benefit.

Similarly, plaintiff's "family compound" or safe haven evidence does not support an inference that the Arroyo Grande property was to be placed in trust for her. There is no evidence the entire Arroyo Grande property was the exclusive means to fulfill the "family compound" promise. In any event, the existence of her residence on the property does not support an inference that she would obtain a fee interest in the Arroyo Grande property upon her parents' death. Plaintiff admitted at her deposition that there were no specific promises made about what property she would inherit. Notwithstanding the absence of any specific promises, plaintiff does not dispute that she and her children have life estates in the family compound.

There is also no merit to plaintiff's contention that John's acquisition of all of the winery stock should be subjected to a constructive trust. Plaintiff's ownership claims are predicated upon her prematurely unenforceable contract against her parents. Plaintiff admitted that she did not know what the promise to leave her 60 percent of the estate

meant. It could mean 60 percent of the total estate. She testified that she did not know if the promise meant 60 percent of each piece of property owned by her parents. However, this is not evidence that Seymour and Reva were restricted by the 60 percent promise from purchasing and then disposing of any specific real or personal property during their lifetimes. At most, the evidence shows there is a promise that is only definable upon plaintiff's parents' deaths.

Finally, there is no basis for punitive damages against John or Sarah for malice, oppression or fraud. No tort has been committed by either John or Sarah. (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 61; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960.) There is also no evidence of malice, fraud or oppression which would warrant the imposition of punitive damages against John and Sarah. (Civ. Code, § 3294; *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872; see also *Tresemmer v. Barke* (1978) 86 Cal.App.3d 656, 668.)

VI. DISPOSITON

The judgments are affirmed. Defendants, Seymour, Reva, John and Sarah Alban and Alban Vineyards, Inc., are awarded their costs on appeal from plaintiff, Julie Alban.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.